Supreme Court, U.S.
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No. 09-889

IN THE

Supreme Court of the United States

DANIEL M. ZACHEM,

Petitioner,

v.

PETER JAMES ATHERTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

Assistant United States Attorney Daniel Zachem is entitled to absolute immunity for his actions to facilitate a grand jury's ability to consider and vote on evidence presented by the government. Zachem's supervisory conduct related directly to the initiation of a prosecution and a prosecutor's role as advocate for the government. His petition for a writ of certiorari ("petition" or "Pet.") should be granted because the decision below, which denied him the protection of absolute immunity, is in conflict with rulings by other circuits and this Court, and because the scope of absolute immunity for prosecutors supervising grand juries is a matter of national importance.

ARGUMENT

A. Respondent's Opposition is Flawed By Its Reliance on a Straw Man Argument Regarding Zachem's Role.

The opposition brief ("Opp.") filed by the Respondent, Peter Atherton, never once confronts the *actual* grounds for absolute immunity advanced by Zachem—*i.e.*, that his conduct facilitated the grand jury's consideration of prosecution evidence. Instead, Atherton attempts to respond to an argument of his own choosing by moving the focus *from* Zachem's actual conduct *to* the removal of Atherton from the grand jury—but that is an act that even Atherton concedes was *not* performed by Zachem. Indeed, the opposition brief's first sentence states: "This case involves the involuntary dismissal of a sitting grand juror *by a jury*

officer of the District of Columbia Superior Court." Opp. at 1 (emphasis added).[1]

Atherton is employing a classic "straw man" technique. Because he is unable to counter Zachem's claim to absolute immunity for (1) listening as a supervising AUSA to grand jurors complain that Atherton was impeding their ability to function, and (2) reporting the disruptive conduct to the court so that the grand jury could function, Atherton resorts to charging that Zachem is not entitled to absolute immunity because he violated a court rule about dismissing grand jurors. *See* Opp. at 12. Although Atherton is correct that the Superior Court Rules do not permit a prosecutor to dismiss a grand juror, that issue is not in dispute, and Zachem did not dismiss Atherton or even take a position on his dismissal because it would have been inappropriate for him to do so. *See* Zachem E-Mail; Appendix ("App.") 77a; Pet. at 6, 19.

Atherton's persistent efforts to ascribe to Zachem the "juror removal" conduct, *but nothing else*, is at odds with the case record and cleverly ignores the actions Zachem actually *did* undertake. Indeed, there is no factual dispute, as the parties largely agree on the chain of events involving Atherton's grand jury conduct, which ended with Atherton's dismissal by jury officer Suzanne

[1] Moreover, even if Zachem's conduct is somehow construed as an unauthorized removal of a grand juror, he would *still* be entitled to absolute immunity because all of his actions were taken in direct support of the prosecution's advocatory interest in having its evidence given due consideration by a grand jury.

Bailey-Jones. Notably, Zachem neither started nor ended this chain of events. Nonetheless, Atherton misleadingly focuses solely on the end result (dismissal) instead of the intermediate conduct actually attributable to Zachem. To determine fairly whether absolute immunity is appropriate here, the full narrative must be considered—not just the narrow, inaccurate snapshot presented by Atherton.

As described in more detail in the petition (*see* pp. 3-7), Atherton began to disrupt the grand jury soon after his panel was empanelled on April 9, 2001. When the panel summoned Zachem on April 11, it was after the prosecutor presenting evidence to the panel had mentioned to Zachem multiple complaints about Atherton that day and after another supervising AUSA had responded to problems with Atherton—without taking action—the day before. Upon entering the grand jury room, Zachem heard exasperated jurors explain, on the record, that Atherton was either unwilling or unable to follow the grand jury rules and that his behavior was impeding the panel's ability to consider the government's evidence and vote on indictments. Considering the repeated disruptions caused by Atherton, and the government's manifest interest in having its evidence given due consideration by the grand jury, Zachem sought to fulfill his role as advocate for the government and supervisor of the grand jury by reporting Atherton's conduct to court officials so that *they* could take appropriate action of their choosing.

Zachem took reasonable steps to facilitate the line prosecutor's presentation of the government's evidence and the grand jury's consideration of the same. Against

this backdrop, Atherton's conclusory assertions that Zachem's conduct "had *nothing to do with* the judicial phase of the criminal process" and "had *no bearing on presentation of evidence* to the grand jury" are untenable. Opp. at 11, 24 (emphasis added). Also unfounded are Atherton's attempts to impute his removal from the grand jury to Zachem. He states, for instance, that "Zachem's action violated the applicable court rule [on grand juror removal]," and "Zachem decided *which* grand jurors could consider whatever was presented . . . ." Opp. at 12, 13. However, Atherton's assertion that Zachem "violated the applicable court rule" about juror removal clearly cannot be squared with his concession that it was the jury officer that actually removed him from the grand jury.

Gaps in logic notwithstanding, Atherton proceeds to use this straw man argument throughout his brief—particularly when trying to downplay the conflicts between the D.C. Circuit's ruling, *Atherton v. Dist. of Columbia Office of the Mayor*, 567 F.3d 672 (2009), and the rulings by other circuits and this Court.

B. The Ruling Below Conflicts with Rulings in Other Circuits.

As explained in the petition, the D.C. Circuit's decision in this case is in conflict with *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3036 (1993), and *Fields v. Soloff*, 920 F.2d 1114 (2d Cir. 1990). Like this case, *DeCamp* and *Fields* involved civil suits by plaintiffs who were *not* the target of grand jury investigations against prosecutors who, like Zachem, were supervising

or advising grand juries but not presenting evidence. The Eighth and Second Circuits concluded that the prosecutors' conduct was protected by absolute immunity. *See Fields*, 920 F.2d at 1120 n.2 ("supervision of the grand jury . . . constituted activity within the scope of their judicial duties"); *DeCamp*, 978 F.2d at 1053 ("[W]e agree with the district court that the special prosecutors helped the grand jury prepare its report in their capacity as the grand jury's legal advisors.").

In attempting to distinguish *DeCamp* and *Fields*, Atherton contends that those "prosecutors were acting in a manner authorized by state law," whereas Zachem's "action in procuring Atherton's removal" was unauthorized. Opp. at 9, 11. But this assertion merely displays Atherton's continued reliance on his straw man argument. He erroneously focuses on the juror-removal issue and ignores the fully authorized role Zachem played in supervising the grand jury and facilitating its function.[2] Furthermore, even if Zachem *had* violated a statute or rule by committing an unauthorized removal of a grand juror, that by itself would not prohibit his entitlement to absolute immunity. This Court has afforded absolute immunity to prosecutors even when, for example, they are accused of knowingly presenting

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[2] In addition, Atherton's argument that *DeCamp* "turned on the fact that the function at issue (helping the grand jury to prepare its report) constituted the proper provision of legal advice within the meaning of a state statute," Opp. at 11, is a mischaracterization of that court's holding. While the *DeCamp* court mentions that the state statute authorizes prosecutors to provide legal advice to the grand jury, it in no way suggests that the result would have been different if there was no specific statute in play.

false testimony at trial and deliberately withholding exculpatory evidence from the defense—so long as the conduct is "intimately associated with the judicial phase of the criminal process . . . ." *Imbler v. Pachtman*, 424 U.S. 409, 416, 430 (1976).

Atherton next asserts that the prosecutors in *DeCamp* and *Fields* acted in "direct support of a proper function of a judge or a grand jury . . . ," but "Zachem acted together with a jury officer who has been determined not to enjoy absolute immunity." Opp. at 9. Again, Atherton is attempting to link Zachem's actions to the ultimate decision by Bailey-Jones. The facts, however, show that if Zachem acted on behalf of anyone, it was the grand jurors and line prosecutor. Indeed, under Atherton's skewed logic, where Zachem supposedly "acted together" with the jury officer, the grand jurors who *initiated* Atherton's removal by first reporting him to Zachem would have to be held equally liable. Yet, it is undisputed that the grand jurors and the line prosecutor are protected by absolute immunity. The same should be true for Zachem.

Also without merit is Atherton's suggestion that the *DeCamp* and *Fields* prosecutors' conduct was more like the traditional advocacy function of seeking indictments than Zachem's. Opp. at 11, 13. The prosecutors in those cases, like Zachem, were neither presenting evidence nor seeking indictments. In *DeCamp*, for example, the prosecutors "helped the grand jury prepare its [investigatory] report *in their capacity as the grand jury's legal advisers*." 978 F.2d at 1053 (emphasis added). In fact, the partially-dissenting judge in *DeCamp* voted against absolute immunity for the prosecutors specifically because their conduct was

unlike that of indictment-seeking prosecutors in traditional absolute immunity cases. *See id.* at 1051-52. (Heaney, J., dissenting).

In *Fields*, the prosecutors were protected by absolute immunity for "actions they undertook as legal advisors to the grand jury" even though they merely oversaw the confiscation of unauthorized material from a grand juror.[3] 920 F.2d at 1120. Their conduct had nothing to do with presenting evidence, or even choosing which evidence to present, despite Atherton's convoluted protestations to the contrary. *See* Opp. at 13. Further, in trying to muster a nonexistent contrast, Atherton remarks that "Zachem's conduct had nothing to do with deciding what evidence the grand jury should consider." *Id.* Although this statement is true, it does not demonstrate any actual distinction from *Fields*. Moreover, the implication that Zachem was somehow removed from the judicial process because he did not choose the evidence presented is false. Zachem played a critical role in the indictment-seeking process that was arguably *more* important than the line prosecutor's. Although the line prosecutor *selected* the evidence, Zachem *made it possible for the grand jury to consider it and vote on it.*[4] Furthermore, Atherton's *own complaint* explicitly states that Zachem "participated/coordinated AUSA efforts seeking grand jury

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[3] *Fields* also bears a striking resemblance to the facts here because it involved a suit by a disgruntled grand juror against a supervisory prosecutor for alleged constitutional violations.

[4] This underscores the point that even if the *Fields* and *DeCamp* prosecutors actually *were* seeking indictments, their conduct was no more deserving of absolute immunity than Zachem's.

indictments" and "participat[ed] himself directly/indirectly in efforts to obtain grand jury indictments." Complaint ¶¶ 33, 38; App. 63-64a.[5] Atherton's conclusion that Zachem's conduct "had nothing to do with any core, or even peripheral, prosecutorial function" is simply inaccurate. Opp. at 13.

Finally, although *DeCamp and Fields* may not contain the *exact* facts that exist here because they do not involve the dismissal of a grand juror, they undeniably address the question presented here: whether absolute immunity is afforded to a prosecutor who is sued for undertaking supervisory conduct to facilitate a grand jury's function. Accordingly, this petition should be granted so that the Court can resolve the circuit split.[6]

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[5] Atherton's predictable attempt to disavow these facts now—because they contradict his current position that Zachem was uninvolved with the grand jury's indictment process—should not be countenanced by this Court. Opp. at 25 n.14. Atherton's argument for ignoring inconvenient facts that he himself alleged is that *pro se* complaints, such as his, should be held to a less stringent pleading standard. *Id.* Although this is a well-settled principle, the concept of "'[l]iberal construction' of *pro se* pleadings is merely an embellishment of the notice-pleading standard . . . ." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). It is not a license for Atherton to alter or ignore facts that he alleged in the complaint.

[6] In addition, Atherton's footnote comment about *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001), indicates that there is a *fourth* court of appeals involved in this circuit split. *See* Opp. at 20 n.11 ("[O]ther courts of appeals . . . have indicated that when a prosecutor's interaction with a grand jury *does not involve the traditional advocacy function of seeking an indictment*, he may *not* be entitled to absolute immunity." (Emphasis added)).

C. The Ruling Below Conflicts with Supreme Court Precedent.

As stated in the petition, the ruling below is at odds with this Court's recent ruling in *Van de Kamp v. Goldstein*, __ U.S. __, 129 S. Ct. 855 (2009). *Van de Kamp* extended absolute immunity to certain "administrative activities" undertaken by supervisory prosecutors as long as they were "directly connected with the conduct of a trial" and "necessarily require[d] legal knowledge and the exercise of related discretion." *Id.* at 862. Atherton argues that *Van de Kamp* is inapplicable here because Zachem was not "directly connected" to the presentation of evidence to the grand jury in the way that the *Van de Kamp* supervisory prosecutors were directly connected to the trial conduct of line prosecutors they had trained. Opp. at 23-24.

In reality, Zachem was actually *more* "directly related" to the judicial phase of the criminal process than the supervisory prosecutors in *Van de Kamp*. The conduct in question for the *Van de Kamp* defendants was "the[ir] office's *general* methods of supervision and training . . . ." 129 S. Ct. at 862. In other words, the defendants' conduct at issue was the *generic* training that they had imparted on subordinates. This training purportedly impacted subordinate prosecutors' trial conduct, but it was not specifically tailored to any single trial. Zachem's supervisory conduct here, however, was in direct response to a precise problem on a *specific* grand jury panel. Thus, the relationship between Zachem's conduct and the judicial phase in this case is more "directly related" than the relationship between the *Van de Kamp* defendants' conduct and the judicial phase at issue there.

In distinguishing *Van de Camp* in the ruling below, the D.C. Circuit made the mistake of following the same straw man argument Atherton repeats here. The court considered *Van de Kamp* to be "inapposite" because Zachem's activities, which supposedly consisted of "*improperly removing a grand juror*," were not related to "a prosecutor's preparation for or participation in a criminal trial." 567 F.3d at 687 (emphasis added). By failing to grant absolute immunity for Zachem's *actual* conduct, which *was* "directly connected to the conduct" of the judicial phase of the criminal process, the D.C. Circuit departed from *Van de Kamp* and other rulings of this Court. *See* Pet. at 14-17. This Court should grant review to ensure the correct application of its holdings on absolute immunity for supervisory prosecutors.

D. The Question Raised in the Petition is Ripe and Appropriate For the Court's Review.

Over the last 35 years, this Court has demonstrated its considerable interest in the application of absolute immunity to prosecutors by issuing numerous rulings addressing various aspects of the topic. *Id.* Absolute immunity has been extended to prosecutorial conduct before grand juries and, more recently, certain "administrative" acts undertaken in a supervisory capacity. Thus, it is perfectly logical for this Court to consider the scope of absolute immunity for prosecutors acting in a supervisory capacity with regard to grand juries. Indeed, even Atherton concedes that "a supervisory prosecutor who does not actively present evidence to a grand jury may be entitled to absolute immunity under appropriate circumstances." Opp. at 9.

Atherton is correct that "[m]ost prosecutorial immunity cases arise in the context of a criminal defendant suing a prosecutor" and, indeed, "all of this Court's decisions" on the issue dating back to *Imbler* address that situation. Opp. at 14-15. But that is *not* a reason for the Court to avoid the issue raised here. Indeed, given that this issue has now come up in multiple circuits (in a conflicting manner), the fact that this Court has *not* reviewed the issue is actually the exact reason why review is appropriate now.

Finally, Atherton offers no basis for his supposition that these facts are not likely to recur. To the contrary, while the precise facts might not recur, it is not difficult to imagine some future disgruntled person connected with the grand jury process—whether a dismissed grand juror or otherwise—suing a supervisory prosecutor for some perceived wrong. In that context, this is an issue of national import that requires the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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